No. 80-1174

IN THE

Supreme Court of the United States

OCTOBER TERM, 1980

SOO LINE RAILROAD COMPANY,

Petitioner,

vs.

TOWN OF EAST TROY, a municipal corporation,

Respondent.

On Petition For Writ Of Certiorari To The United States Court Of Appeals For The Seventh Circuit

RESPONDENT'S BRIEF IN OPPOSITION

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RESPONDENT'S BRIEF IN OPPOSITION

Respondent, Town of East Troy, respectfully suggests that the Petition for Writ of Certiorari be denied.

STATEMENT OF THE CASE

This suit involves a claim for damages resulting from groundwater pollution due to leakage from a railway tanker car following a derailment. The action was origi-

nally brought by a number of individuals as well as the Town of East Troy. Damages were claimed to have proximately resulted from specific acts of negligence on the part of the Soo Line Railroad Company (R. 3).

While the individual plaintiffs had all claimed that their private property rights had been interfered with due to, among other things, the contamination of their wells and septic systems, the Town complained that the spill had poisoned the upper (groundwater) aquifer in a large area surrounding the derailment site, and that the carbolic acid would continue to move within the groundwater system for a substantial number of years, thus endangering still more wells and presenting an ongoing threat to the health, comfort, safety and property of the residents, school children, property owners, taxpayers, tourists, and guests of the Town (R. 3).

Petitioner has suggested to the Court that the Town brought this lawsuit for the purpose of recovering the amount of a federal grant used to construct a public water system (Petition at p. 5). Such statement is incorrect in that the Town's ad damnum had nothing do do with the application for or use of federal grant funds.

The damages which the Town demanded totaled approximately $543,000.00, and represented the direct out-of-pocket costs incurred and paid by the Town to abate the public health nuisance created by the spill, of which $125,000.00 constituted the cost of a public water well and distribution system, with the balance of funds expended on engineering fees, water-testing fees, attorneys' fees, monitoring wells, seismic surveys, truck rental, water purchases, and salaries (Pl. Exs. 96, 97, 98, 99A and 99B; Offered at Tr. 664, 664, 675 and 712, 540, 675 and 712, respectively, and Received at Tr. 667, 667, 715, 715 and 715, respectively).

Prior to trial, U.S. District Court Judge Myron L. Gordon determined that the Town's expenses were incurred as the result of a justified attempt to overcome the public nuisance created by the spill, and thus constituted injuries peculiar to the Town for which the instant action could be maintained (Pet. App. 22).

The Soo Line protested that the Town ought not to be allowed to claim as damages, those expenses partially financed by a Block Grant obtained by the Town pursuant to the Housing and Community Development Act of 1974. Judge Gordon denied this contention both prior to trial in an Order Denying Summary Judgment (Pet. App. 23) and subsequent thereto in his Decision and Order Denying Soo Line's Post Trial Motions (Pet. App. 26), in each instance holding that the collateral source rule (providing that a negligent tortfeasor may not take advantage of payments received by an injured party from an independent source) applied to funds given to a plaintiff by a governmental agency.

Following their deliberations after the close of evidence the jury found (R. 129, Tr. 1450-1455):

1. The Soo Line negligent as to track installation and maintenance, as well as to train operation;
2. That such negligence (in both instances) was a proximate cause of the Town's damages;
3. That a public nuisance resulted; and
4. That $500,000.00 would reasonably compensate the Town for its damages.

On appeal, the Seventh Circuit unanimously affirmed (Pet. App. 1).

ARGUMENT

The decision of the Court of Appeals, affirming that of the District Court with respect to both the recovery of necessary and reasonable expenses incurred in the exercise of the Town's lawfully delegated powers, as well as the applicability of the collateral source rule, is correct. There is no conflict or any other basis for further review by this Court.

NONE OF THE ENUMERATED SPECIAL CONSIDERATIONS SET FORTH IN RULE 17 EXIST REQUIRING REVIEW ON CERTIORARI

Petitioner is required pursuant to Rule 21.1(j) of the Rules of the Supreme Court to enumerate the special and important reasons present herein for this Court to exercise its discretion to grant a review on certiorari, referencing those reasons to the standards set forth in Rule 17.1. The latter Rule provides that the character of reasons which will be considered in the grant of a Petition are as follows:

1. Where a Court of Appeals has rendered a decision in conflict with another Court of Appeals on the same matter;
2. Or has decided a federal question in a way in conflict with applicable state law;
3. Or has so far departed from the accepted and usual course of judicial proceedings as to call for an exercise of the Court's power of supervision;
4. When a state court of last resort has decided a federal question in conflict with the decision of another state court of last resort or of a federal court of appeals; or

5. When a state court or federal court of appeals has decided an important question of federal law which has not been, but should be, settled by this Court, or has decided a federal question in a way in conflict with applicable decisions of this Court.

Notwithstanding Rule 21, Petitioner fails to cite concisely or with specificity the reason this Court should grant the Petition, but instead uses the Petition to attack the merits of the lower court decisions.

Their position is that Judge Gordon and the Court of Appeals have misinterpreted the law of the State of Wisconsin as applied to the redress of public nuisances. They continue to assert that the terminology of Wisconsin Statute, Section 823.01 requires a municipality to have incurred damage to publicly-owned real or tangible personal property as a prerequisite to the maintenance of a suit for damages.

This interpretation has been uniformly rejected in the courts below, and will be discussed in brief hereinafter. However, with respect to the grant or denial of the Petition, it should be noted that in any event, certainly there is no federal question involved in this litigation, including the positions taken by Petitioner as described above.

Nor can it be said that the decisions reached herein by the lower courts are in conflict with any decision of another Court of Appeals or of any decision of the United States Supreme Court. No such conflicting decisions have ever been identified by the Petitioner.

Petitioner does not suggest that the trial court or the Court of Appeals have, procedurally, departed from any accepted or usual course of judicial proceedings. Furthermore, the Petitioner has not suggested, and of

course it cannot, that even if the trial court or the Court of Appeals had departed from any accepted and usual course of judicial proceedings, that it was such a departure as to call for the Supreme Court to exercise its supervisory powers over either the trial court or the Court of Appeals.

Under these circumstances, Petitioner is bound to persuade this Court that compelling reasons other than those specifically identified in Rule 17 are presented in this matter which require the attention of this Court.

THE COMMUNITY DEVELOPMENT ACT AND OTHER FEDERAL GRANT PROGRAMS ARE IRRELEVANT TO THE ISSUES ON APPEAL

The Petitioner fails to relate any reason for review other than a general admonition that the decisions of the District Judge and Court of Appeals are "wrong", and unless corrected, will result in attempts to use federal grants as a means of generating "fictitious damage" claims and "windfall recoveries" contrary to public policy.

No appeal has ever been made of the jury's finding that a public nuisance resulted from the spill. The Petitioner *agrees* that the Town was empowered to take action to protect its citizens by constructing a previously non-existent deep water well and distribution system, and *concedes* the applicability of the collateral source rule to the receipt of grant funds (including federal funds) by an injured party.

However, as set forth hereinabove, Petitioner contends that the Town is not an "injured party" and may not maintain this action, since the spill caused no "actual damage" to Town-owned property or facilities.

Under this interpretation, although repeated mention is made in the Petition of federal grants, double recoveries, etc., the point which Petitioner makes is that all the expenses which were incurred by the Town to investigate and clean up the spill, as well as to provide a safe source of potable water supplies to those families whose wells were contaminated, are not recoverable *regardless* of the source of funds (i.e., tax monies, bond proceeds or grant funds).

The key to discussion, then, is whether the Town suffered actual damage or loss, and not the method of financing. The determination of whether damage was or was not suffered is made by applying the substantive law of the State of Wisconsin, a proposition unrelated to federal law and/or the public purposes of various federal grant programs.

The lower courts have considered Petitioner's argument and have rejected same. There can be no prerequisite that a public body must incur damage to publicly-owned real or personal property prior to bringing its action to redress a public nuisance.

Obviously, if some activity fails to constitute a public nuisance, municipal authorities may not bring suit unless they have incurred special damage (i.e., private nuisance). Likewise, a private party may not sue to abate a public nuisance unless he/she has suffered some harm different from that which has been suffered by the public at large.

The rule that bars private parties from suing in public nuisance (without some special damage) cannot be equated to an inability of government to redress public nuisances occurring within their territorial jurisdiction.

A determination that a municipality must incur special injury to its own real or personal property prior to bringing suit to redress a public nuisance (as Petitioner contends) would, in essence, have nullified any distinction between public and private nuisances, and vitiated the ability of the government to act for the protection of life and property of the public at large; and to have entered judgment upon the basis suggested by Petitioner would have left the populace without a remedy in cases where individuals have sustained no injury apart from the rest of the community.

Both the District Judge and the Court of Appeals recognized the fallacy in Petitioner's argument, and ruled that the question of damage turns upon the negligent interference with rights enjoyed by the public at large, including the right to an uncontaminated groundwater supply, and the right to live without a substantial threat to public health. Once these rights were negligently interfered with, the lower courts correctly found that Wisconsin statutory and common law provide for redress by the appropriate municipal authorities (see, e.g., *Boden v. Milwaukee*, 8 Wis.2d 318, 99 N.W.2d 156 (1959) and *Town of Norway v. State Board of Health*, 32 Wis.2d 362, 145 N.W.2d 790 (1966)), and that all necessary and reasonable expenses that are incurred to deal with the situation are recoverable pursuant to the unambiguous terms of Wisconsin Statute, Section 823.01 which provides:

> 823.01 Jurisdiction over nuisances. Any person, county, city, village or town may maintain an action to recover damages or to abate a public nuisance from which injuries peculiar to the complainant are suffered, so far as necessary to protect the complainant's rights and to obtain an injunction to prevent the same.

It is recognized that the considerations set forth in Rule 17 are not exclusive; however, the attempt by Petitioner to bring its Petition on the basis of sensationalistic titles and catch-phrases to suggest that this case involves the viability of federal grant programs is lacking in this instance.

No state or federal agency, nor any division of any state or federal government, nor any department thereof is a party or has been a party to this action, nor are their rights in any way affected by the imposition of ultimate liability on the wrongdoing party for loss which its negligent acts caused.

In fact, the public purposes of the Community Development Act have been well served in this instance in that grant funds were used to partially finance a solution to the disastrous consequences of the spill, to prevent the deterioration of a substantial portion of the Town of East Troy, and to literally save the unincorporated community of Beulah Station from oblivion. This is exactly what the program was created to do.

Petitioner states that the question presented for review herein is whether federal grants may be used to create fictitious tort damages and windfall recoveries. A review of their position, however, is indicative that federal grant funds have nothing to do with the appeal.

Certainly, funds received from any source ought not to be utilized for sham purposes. The question of whether or not an item of damage is allowable or not is, and always has been determined by the fact-finder after considerations regarding whether or not such expense proximately flowed from the negligent act are resolved. Therefore, the "question presented for review" herein will continue to be answered in the negative. Damages

cannot be created, and are determined irrespective of the origin of funds utilized to pay the questioned expense.

THE LOWER COURTS HAVE PROPERLY APPLIED THE COLLATERAL SOURCE RULE TO THE RECEIPT OF GRANT FUNDS

All expenses were incurred by the Town, and paid by the Town.

The Soo Line claims that the Town should not be entitled to what it claims because in effect, it may allow a form of double recovery, using the term "windfall". They are not claiming that HUD has been subrogated to any interest in that any claims for these expenses more properly belong to HUD or the United States government than the Town. They allege no statutory exclusion for such liability nor any statutory right by HUD to be the recipient of such damages as opposed to the Town of East Troy. They simply allege that the Town suffered no actual damage, and that in any event it is against public policy to allow a double recovery. These arguments were twice considered by the trial judge, twice rejected (Pet. App. 19 and 25), and again rejected by the Court of Appeals (Pet. App. 14-15). That the Town incurred damages has been discussed above. In terms of a "windfall recovery", the Wisconsin courts have long held that it is not proper to give a deduction for collateral payments received from sources other than the tortfeasor (see, e.g., *Rixmann v. Somerset Public Schools*, 83 Wis.2d 571, 266 N.W.2d 326 (1978). In fact the two cases cited by Petitioner—*Roundhouse v. Owens-Illinois, Inc.*, 604 F.2d 990 (6th Cir. 1979), and *Eichel v. New York Central R.R.*, 275 U.S. 253 (1963)—both applied the rule to the receipt of federal funds by an injured party.

The method or manner in which the Town sought and obtained financing to partially pay the substantial costs it was incurring to abate the pollution created by the tortious acts of the Petitioner is, as Judge Gordon and the Court of Appeals have rightfully concluded, immaterial. The ultimate responsibility for this contamination has fallen upon the guilty party. To allow the wrongdoers now to escape responsibility for their actions and thereby be the recipient of a windfall would be unconscionable.

CONCLUSION

The ruling by two courts, upon reviewing the record, that the expenses incurred by the Town of East Troy (in cleaning-up the spill of a poisonous substance and constructing a public well to provide a safe source of water for residents whose wells had been contaminated) constituted injuries/damages for which recovery may be had (irrespective of the receipt of federal funds) does not present an important question of federal law unsettled by this Court or one in conflict with another Court of Appeals or a case otherwise calling for the supervision of the Supreme Court of the United States. Rather, the issue is one of an interpretation of the law of the State of

Wisconsin which the lower courts have uniformly construed in the Respondent's favor. The Petition should be denied.

Respectfully submitted,

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